ORIGINAL

No. 83-5596

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH ROBERT SPAZIANO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a petition for certiorari which merely duplicates a previously filed petition, which was denied and for which rehearing was denied, should be entertained or granted.

II. Whether Petitioner has established any basis for reconsideration of Barclay v. Florida.

III. Whether Petitioner's Personal theory regarding the reasons judges sometimes override advisory sentences constitutes a legal basis for review.

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OPINION BELOW

The opinion of the Florida Supreme Court is reported at 433 So.2d 508 (Fla. 1983). The prior opinion of the Florida Supreme Court is reported at Spaziano v. State, 393 So.2d 1119 (Fla. 1981) cert. denied 454 U.S. 1037 (1981) reh. den. ___ U.S. ___, 102 S.Ct. 1041 (1982).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that this petition raises issues concerning the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, §§ 921.141 and 932.465, Florida Statutes and Rule 3.490, Florida Rules of Criminal Procedure.

STATEMENT OF THE CASE

Joseph Spaziano, a member of the Outlaws motorcycle Gang, was convicted in 1976 of the first degree murder of Laura Harberts and sentenced to death.

Spaziano's conviction and death sentence were reviewed by Florida's Supreme Court. Spaziano v. State, 393 So.2d 1119 (Fla. 1981) cert. denied 454 U.S. 1037 (1981) reh. denied, ___U.S.___, 102 S.Ct. 1041 (1982).

In his direct appeal to Florida's Supreme Court, Spaziano challenged the general sufficiency of the evidence used to convict him, the court's giving of a "dynamite" charge, alleged improper arguments by the prosecution, alleged limitations on his right of cross examination and an attack upon his death sentence. The latter attack challenged the findings of certain aggravating circumstances; the general constitutionality of the Florida death penalty statute, and a Gardner[1] violation.

After filing his initial brief, Spaziano filed a "Notice of Supplemental Authority" citing Beck v. Alabama, 447 U.S. 625 (1980).

The Florida Supreme Court remanded the case for resentencing pursuant to its finding that the dictates of Gardner had been violated. The trial judge ordered a new presentence investigation and Spaziano was permitted to respond. The death sentence was reimposed.

While on remand, however, Spaziano petitioned this Honorable Court for certiorari review. The question presented for review was:

> "Whether the State of Florida has violated the due process and equal protection clauses of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to The Constitution of the United States by arbitrarily denying to persons charged with first degree murder who were prosecuted after the statute of

1. Gardner v. Florida, 430 U.S. 349 (1977).

> limitations had run on all lesser degrees of murder and manslaughter the right that is conferred on all persons charged with degree crimes in Florida; to have the jury charged on all lesser degrees of murder and manslaughter."

In petitioning for certiorari, Spaziano noted that the "identical" legal issue had been raised by petition for certiorari (also denied) in Holloway v. Florida.[2]

Significantly, Spaziano also argued:

> "The effect of the classification in the instant case has been that Petitioner has been sentenced to die as the trial judge overruled the only safeguard left to Petitioner's jury - the advisory sentence of life imprisonment. Such an invidious result cannot be squared with Constitutional guarantees."

Certiorari was denied, as was rehearing.

Spaziano's death sentence was reimposed and was reviewed by the Florida Supreme Court. Spaziano v. State, 433 So.2d 508 (Fla. 1983).

Spaziano's second review addressed the "scope" of the Court's original remand, the "failure" of the trial judge to recuse himself on remand, another alleged Gardner violation, the sufficiency of the evidence in support of the finding that the murder was especially heinous, atrocious or cruel, and a claim that any override of a jury's advisory sentence violates the Fifth, Eighth and Fourteenth Amendments.

These arguments were rejected, and rehearing was denied on July 13, 1983.

It must be noted that when Spaziano first petitioned this Honorable Court for certiorari review, he raised the Beck issue. In petitioning for rehearing in this Court, Spaziano argued:

> "The Petitioner, who has been sentenced to death by electrocution, respectfully moves this Court for an order vacating its November 9, 1981 denial of his petition for a writ of certiorari to the Supreme Court of Florida..."

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2. Holloway v. Florida, 362 So.2d 333 (Fla. 3d DCA 1978), cert. den. 379 So.2d 953 (Fla. 1980), U.S. cert. den. 449 U.S. 905 (1980).

Rehearing was denied on January 11, 1982.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied inasmuch as the Petitioner has failed to present any legal basis for this Honorable Court to reconsider its prior, controlling decisions on the questions raised.

ARGUMENT

A PETITION FOR CERTIORARI WHICH MERELY DUPLICATES A PREVIOUSLY FILED PETITION, WHICH WAS DENIED AND FOR WHICH REHEARING WAS DENIED, SHOULD NOT BE ENTERTAINED OR GRANTED.

It is suggested that if the rules of this Honorable Court disallow successive motions for rehearing, those rules cannot be circumvented or frustrated by the filing of repetitious, successive petitions for certiorari. To permit the rehearing rule to be frustrated by the filing of duplicate, de novo petitions would render impossible either finality of litigation or management of the court's burgeoning caseload.

Mr. Spaziano states that his case has now "changed" because he was resentenced to death, and, therefore, that new life has been breathed into his claim that he is entitled to relief under the decision in Beck v. Alabama, 447 U.S. 625 (1980). The State of Florida respectfully disagrees for a variety of reasons.

First, the tone of the Petitioner's argument implies that serious consideration of his petition can only occur now that he has been resentenced to death. The obvious implication of this is that the Supreme Court either casually rejected his first petition or did not put serious effort into its decision. The State cannot accept an argument that this Court does not seriously or conscientiously perform its duty.

Second, the State rejects the argument that Spaziano has "now" been sentenced to death, and as a result his case has changed. As noted above, when Spaziano petitioned for

rehearing last time he filed this identical petition, he represented to this court that he was under sentence of death by electrocution. Technically, of course, his death sentence was subject to "resentencing." However, in terms of how this petition was presented or the gravity of the case, it was presented then, as now, as a petition filed on behalf of one sentenced to death. Therefore, the petition has been refiled in this court in precisely the same posture as it was before.

Third, it is suggested that the mere imposition of sentence has no bearing on the so-called Beck v. Alabama issue. That case addressed the issue of jury instructions during the guilt-innocence stage of a murder trial. Last time Spaziano was here, he had been adjudicated guilty after the so-called Beck error. The claim of error was rejected by this Honorable Court.

The "error," therefore, related to the conviction, not the sentence, and cannot be revived merely because of the sentence.

Fourth, of course, is the basic fact that no novel issues are presented by this duplicate petition.

Beck v. Alabama, 447 U.S. 625 (1980) dealt with statutory prohibitions against the giving of applicable instructions as to lesser degrees of the offense charged.

This case involves the giving of jury instructions on lesser degrees of murder when the statute of limitations has run on those offenses, and thus the lesser degrees were not proven or supported by the evidence.

When the statute of limitations has run on the lesser degrees of murder, jury instructions on the lesser degrees are not required, nor are they even proper. Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978) cert. den. 379 So.2d 953 (Fla. 1980), U.S. cert. denied 449 U.S. 905,908 (1980).

Interestingly, when this Honorable Court denied certiorari in Holloway, Mr. Justice Blackmun noted in dissent:

> "The legal question may be determined by whether the defendant himself chooses to invoke a statute of limitations defense."

Contrary to the arguments of Mr. Spaziano in his first petition and in this duplicate petition, Spaziano was not "refused" instructions on the lesser degrees of murder. Rather, Spaziano adamantly protested the giving of those instructions and demanded that they not be given.

Spaziano, it seems, invoked a statute of limitations defense as to all lessers, and insisted on presenting the case to the jury on an "all or nothing" basis.

Having chosen his strategy, he cannot be relieved of the consequences of his choice now, simply because he lost.

Finally, Mr. Spaziano may contend that he was deprived of the "jury pardon" phenomenon by the court's acquiescence to his demand. Nothing exists of record reflecting a desire on the part of the jury to pardon Spaziano. If it had wanted to do so, or felt that the level of proof did not rise to "first degree" murder, it would have acquitted him.

The State also questions the propriety (if nothing else) of a system whereby a jury could be misled into believing it had the option to convict a murderer of a lesser degree of murder, giving that defendant a "break" in the form of a lighter sentence, but not just letting him go free, when in fact their "limited pardon" would in fact serve as a full pardon. Can such deception be justified? Or would this practice have a chilling effect on all "jury pardons"?

This first argument, it is submitted, abuses the writ to the extent that it merely duplicates an earlier petition, is factually incomplete, and legally without merit.

II. THE PETITIONER HAS FAILED TO ESTABLISH ANY BASIS FOR RECONSIDERATION OF BARCLAY V. FLORIDA, ___U.S. ___, 103 S.CT. 3418 (1983).

The "federal question" purportedly raised by Mr. Spaziano's second argument is unclear.

It is given that the jury override is constitutional. See Barclay v. Florida, ___U.S. ___, 103 S.Ct. 3418 (1983); Dobbert v. Florida, 432 U.S. 282 (1982); Proffitt v. Florida, 428 U.S. 242 (1976). What, therefore, is Petitioner arguing?

It would appear that this argument is nothing more than a bare assertion that Mr. Spaziano disagreed with the trial judge's decision after that judge weighed the evidence.

It is suggested that the "weight of the evidence" is no more a proper subject for certiorari review than it is for appellate review. This Honorable Court has never agreed to reweigh evidence based upon cold transcripts and replace state court findings of fact with its own. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981), ___U.S. ___, 102 S.Ct. 1303 (1982).

The Petitioner's mere disagreement with the decision of the trial judge, as affirmed by Florida's Supreme Court, is not a basis for certiorari review, nor does it justify reconsideration of the decisional law of this Honorable Court.

III. NO ARGUABLE BASIS FOR GRANTING CERTIORARI EXISTS ON THE BASIS OF SPAZIANO'S PERSONAL BELIEF AS TO WHY JUDGES DO NOT BLINDLY FOLLOW ALL ADVISORY VERDICTS.

After conceding that the jury override is constitutional, Mr. Spaziano asks for certiorari review of "jury overrides" because of four personal suspicions, to wit:

(1) "The nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross-section of the community whose outrage is being expressed; (petition page 24)

(2) "Judges have no special expertise and in fact juries are the true "experts" on whether death is appropriate in any given case." (page 24)

(3) "The practice of overturning a jury's penalty is contrary to the overwhelming national practice since at least 1948." (page 24)

(4) "It is also contrary to the great weight of professional legal opinion." (page 24).

It is interesting that in Mr. Spaziano's appellate brief to the Florida Supreme Court, at page 34, (appendixed), Mr. Spaziano waived any argument on the propriety or constitutionality of a trial judge's decision to override a jury suggestion of life.

Having waived this argument in Florida's Supreme Court, it should not be entertained de novo in this court.

Mr. Spaziano's four social theories about how and why death is imposed and "who knows best" to impose it are interesting but hardly legal.

The issue of whether judges should be blinkered and bound by jury suggestions, for or against death, was decided against Spaziano in Furman v. Georgia, 408 U.S. 238 (1972) as well as Barclay v. Florida, ___U.S. ___, 103 S.Ct. 3418 (1983); Dobbert V. Florida, 432 U.S. 282 (1982) and Proffitt v. Florida, 428 U.S. 242 (1976).

It is submitted that judges can, and do, overturn advisory sentences favoring death regularly. While Mr. Spaziano may not agree with the override procedure, many of his fellow murderers undoubtedly welcome it. Be that as it may, however, the fact remains that this issue was waived in Florida's Supreme Court and in any event has not been shown to be ripe for (yet another) certiorari review.

CONCLUSION

Mr. Spaziano's three points represent nothing more than his personal desire to have this court review and reject

a significant body of its own decisional law.

Certiorari should not be granted for many reasons:

First, this petition was already denied (as was rehearing) once. One cannot circumvent the prohibition against multiple requests for rehearing by filing new petitions.

Second, his petition rests largely upon his personal interpretation of the evidence adduced at trial and at sentencing, an interpretation that, not surprisingly, differs from the verdict. This is not a trial court.

Third, Spaziano's pet social theories about why judges override jury suggestions do not constitute either new, credible argument or a basis for revisiting similar arguments previously rejected.

Fourth, Spaziano declined to argue the jury override issues presented in his third argument to Florida's Supreme Court.

In sum, there is no legal or factual reason to grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To The Supreme Court Of Florida, Brief For Respondent In Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

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All parties required to be served have been served on this 14th day of November, 1983.

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